No. 83, Original

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF MARYLAND, *et al.*,

*Plaintiffs,*

*v.*

STATE OF LOUISIANA,

*Defendant.*

*ON THE REPORT OF THE SPECIAL MASTER*
*DATED SEPTEMBER 15, 1980*

## MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFF'S EXCEPTIONS AND MEMORANDUM RESPONSE

[Counsel listed inside front cover]

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## MOTION OF PIPELINE COMPANIES FOR LEAVE TO FILE RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

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The pipeline companies, intervenor-applicants in this proceeding*, through their undersigned counsel of record, respectively move the Court for leave to file the

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*Columbia Gas Transmission Corporation, Consolidated Gas Supply Corporation, El Paso Natural Gas Company, Florida Gas Transmission Company, Michigan Wisconsin Pipe Line Company, Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, Sea Robin Pipeline Company, Southern Natural Gas Company, Tennessee Gas Pipeline Company (a division of Tenneco, Inc.), Texas Eastern Transmission Corporation, Texas

[footnote continued]

attached response to Louisiana's Reply to Plaintiffs' Exceptions with respect to the report of the Special Master dated September 15, 1980.

As support for this motion, the pipeline companies incorporate by reference the grounds set forth in their motion dated November 14, 1980 for leave to file exceptions, and supporting brief, to the same report of the Special Master. By order dated December 15, 1980 the Court granted the requested leave.

Also, as support for this motion, the pipeline companies note that Louisiana has attached to its Reply the lengthy "Proffer of Proof" which it submitted to the Special Master (a document which heretofore was not before the Court). Included in the attached response is the pipeline companies' response to the Proffer, in which it is demonstrated that the assertions in the Proffer do not raise material issues of fact bearing on the issues presented in the plaintiffs' motion for judgment on the pleadings.

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Gas Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, and United Gas Pipe Line Company, ("the pipeline companies").

The listing required by the recent amendment of the Court's Rule 28.1 was set out in the Appendix to the Motion of the Pipeline Companies for Leave to File Reply to Louisiana's Exceptions and Memorandum Reply, dated December 5, 1980.

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## MEMORANDUM RESPONSE TO LOUISIANA'S REPLY TO PLAINTIFFS' EXCEPTIONS

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Despite the length of Louisiana's reply to exceptions filed by the plaintiffs and the intervenor applicants, only a brief response is called for.

Louisiana at the outset reiterates its claim that the plaintiff States are surrogates for the pipeline companies and hence the instant proceeding should be dismissed for jurisdictional and prudential reasons (Reply at 5-13). Louisiana purports to find fresh support for this thesis in

> a remarkable confluence of (a) identical constitutional issues, (b) identical factual statements, and (c) identical supporting arguments (footnote omitted) (Reply at 6).

But, these alleged "identities" do not negate, nor in any way detract from, the differences in interests and perspective between the pipeline companies and plaintiff States. The pipelines' interests stem from the facts, *inter alia*, that the first use tax is by statute imposed upon them, and they are subject to various penalities should they fail to pay the tax. The interests of the plaintiff States, stem from the facts, *inter alia*, that by pass-through, the tax was designed to be, and in fact operates as, a burden upon them and their citizens. In light of these differences in the interests of the plaintiff States and those of the pipeline companies, not only are the plaintiff States not surrogates for the pipeline companies, but the interests of the pipeline companies fully warrant their intervention in this proceeding.

Louisiana also argues that granting judgment on the pleadings without evidentiary hearings is inappropriate when (1) constitutional issues are presented (Reply at 14), and (2) the Court's original jurisdiction is being invoked (Reply at 23). However, neither of these considerations has prevented summary disposition where, as here there is in actuality no genuine dispute as to any material fact. See, *e.g., Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1977), where, on a motion to dismiss, the Court held that the New York tax on its face resulted in unconstitutional discrimination in violation of the Commerce Clause. Similarly, in original actions the Court has disposed of controversies involving states, including specifically Louisiana, withour any evidentiary hearings. *See e.g., United States v. Louisiana, etc.*, 363 U.S. 7, 84-85 (1960); *United States v. Texas*, 339 U.S. 707, 711-715 (1952).

Moreover, the Supremacy Clause and Commerce Clause issues presented by the motions for judgment are based on facial violations, *i.e.*, (1) that the first use tax *on its face* invades comprehensive federal regulatory schemes in violation of the Supremacy Clause, and (2) that the tax *on its face* results in unconstitutional discrimination and risk of multiple taxation in violation of the Commerce Clause. Consequently, as shown in our Brief Supporting Exceptions, there are no genuine issues of material fact standing in the way of granting the motions for judgment on the pleadings.

The foregoing conclusion is in no way undercut by Louisiana's claim that its answer to the complaint of the plaintiff States purports to deny or put into question virtually every material assertion (Reply at 17). The short answer to that assertion is given at page 39 of the brief of the plaintiff States in support of their motion for judgment on the pleadings (quoted at length at page 17 of Louisiana's instant reply).

Nor is this conclusion impaired by the extensive Proffer of Proof, submitted by Louisiana to the Special Master, in which Louisiana sets out its view of the facts and circumstances on which it claims evidentiary hearings are needed for a determination of the validity of the first use tax.[1]

Review of the various assertions in the "summary" of Louisiana's Proffer (Reply at 28-33) discloses that Louis-

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[1] In view of Louisiana's reproduction of its entire Proffer as an appendix to its instant Reply, we have set out in the Appendix hereto our response to the Proffer. As there shown, the assertions in Louisiana's Proffer reflect either alleged facts which are not relevant to, and do not affect, the issues raised in the motions for judgment on the pleadings, or conclusions of law which have already been conclusively determined contrary to Louisiana's position by authoritative precedents.

iana's factual allegations may readily be treated as true or irrelevant for the purposes of deciding the instant motions. The *foci* of Louisiana's proffer are the assertions that there is a distinction between "raw" and "refined" gas, that processing is necessary to convert "raw" gas into "refined" gas, and that interstate commerce does not commence until after the completion of processing at the tailgate of the processing plant. See Reply at 28-33, 37-38. Contrary to Louisiana's claims that these assertions are factual in nature, as to which evidentiary hearings are required, in actuality they constitute legal conclusions – legal conclusions which have been resolved against Louisiana's position by established precedents.

As shown in our Brief on Exceptions at 20-21,[2] it is established (1) that natural gas as it is produced at the wellhead is "natural gas" under the Natural Gas Act regardless of the presence of various impurities and other elements, (2) that such gas (and in particular, the outer continental shelf gas here involved) which moves across state boundaries is in interstate commerce throughout its journey from the wellhead to at least the point of its sale for resale or consumption under the Natural Gas Act as well as under the Commerce Clause generally, and (3) that the processing of the gas in the course of that interstate journey in no way interrupts or affects its continuity. See also Report of the Special Master at 6. With Louisiana's assertions as to raw gas – refined gas dichotomy and the effect of processing thus being unsound and invalid as a matter of law, they plainly do not stand in

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[2]See also our response to the Proffer, at 6-9; Brief on Exceptions of the plaintiff States at 22, 29, n. 12; and Brief on Exceptions of the United States at 15-21.

the way of granting judgment on the pleadings without evidentiary hearings.[3]

## CONCLUSION

For the foregoing reasons, and those stated in our brief in support of exceptions to the Special Master's instant report, it is respectfully submitted that the Court should

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[3]Our response to Louisiana's Proffer (Appendix at 14a-18a) summarizes the undisputed matters establishing the propriety of granting the motions for judgment on the pleadings as a matter of law.

hold that Louisiana's tax is void on its face under both the Supremacy Clause and the Commerce Clause.

Respectfully submitted,

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